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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 387

PHELPS DODGE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion and concurring opinion of the court below (R. 923–930) are reported in 113 F. (2d) 202. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 837–919) are unreported.

JURISDICTION

The decree of the court below (R. 930–933) was entered on July 26, 1940. The petition for a writ of certiorari was filed on August 30, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the Board, which were sustained by the court below:

(a) that petitioner, in refusing to reinstate certain strikers, discriminated against them because of their union activities; and

(b) that the labor dispute was "current" at the time of these refusals and on the effective date of the National Labor Relations Act.

2. Whether the Act authorizes an award of back pay independently of reinstatement.

3. Whether the Board's back pay order is arbitrary or excessive because of the substantial lapse of time between the commission of the unfair labor practices and the issuance of the Board's decision.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 16–18.

STATEMENT

Upon the usual proceedings[1] the Board issued

[1] These, pursuant to Section 10 of the National Labor Relations Act, were: charge and amended charge (R. 4–9), complaint (R. 10–27), answer (R. 28–41), hearing before a trial examiner, intermediate report of the examiner (R. 687–717), exceptions thereto (R. 718–746), oral argument (R. 749), reargument (R. 836), and the filing of a brief before the Board (R. 747).

its findings of fact, conclusions of law, and order (R. 837–919). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

Petitioner, a large producer of copper ore, is extensively engaged in interstate commerce (R. 840–843; R. 614–620, 675–677). In September 1933, the International Union of Mine, Mill and Smelter Workers, Local No. 30, a labor organization herein called the Union, was organized at petitioner's mine (R. 843; R. 158, 284, 393). Petitioner evidenced its hostility to the new organization by segregating its members in a separate shaft (R. 843–844; R. 197, 596, 645, 647) and by instituting a system of labor espionage (R. 845; R. 610). On June 10, 1935, because petitioner had discharged eight union men, the Union called a strike and began to picket the mine (R. 844–845; R. 101–102, 174, 193, 530, 592–593, 645–647). Although the strike caused a curtailment of petitioner's production for several weeks (R. 845; R. 663, 583–584), by June 28 petitioner had replaced all the strikers with new employees and had resumed normal operations (R. 845; R. 530–531, 538, 584–585). The strike, including daily picketing of the mine, nevertheless continued through July (the Act became effective on July 5) and until August

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

24, 1935, when the Union voted to terminate the strike and disbanded the picket line (R. 845, 848; R. 101, 108, 159, 174–175, 219, 292, 367, 397, 648, 650–659, 669).

The Board found (R. 861, 863–864) that both during and after the strike petitioner adhered to a deliberate policy of refusing to permit any of the strikers to return to work, although vacancies occurred and the strikers sought to return. During the first week of the strike, petitioner's employment manager, Bateman, was given explicit instructions, which were never changed, to "go slow" in reinstating any of the strikers (R. 846; R. 142, 535). Thereafter, during June, Bateman declared to various strikers that they would never again work for petitioner (R. 850; R. 298, 420, 116, 199). After the Act took effect and prior to the termination of the strike on August 24, the strikers on three separate occasions, August 9 (R. 845, 847; R. 654–655), August 21 (R. 850–852, 855; R. 104–106, 112–115, 159–160, 175–176, 199–200, 207–208, 400), and August 23 (R. 845, 847–848; R. 106–108, 657–658) applied to petitioner for reinstatement, but on each occasion petitioner replied that it would not reinstate any of the strikers (*ibid.*).[5] Between August 9 and August 24, some

[5] At the hearing, petitioner's assistant general superintendent, H. C. Henrie (R. 658), conceded that at the time of the August 9 application and at all times thereafter, it was petitioner's "policy" not to "put those men back to work" (R. 599–600).

21 jobs became available which could have been filled from the strikers' ranks; instead, petitioner filled them with new applicants (R. 859, 860, 863; R. 750–753, 106, 113–114, 538). After August 24, and up to the date of the hearing, petitioner hired more than 2,000 employees (R. 859; R. 751–752) without departing in a single instance from its policy of barring the strikers from its employ; almost every striker applied to Bateman for employment, but was rejected because he had engaged in the strike (R. 845, 852–856, 861, 864, 870–907; R. 165–166, 170–171, 176, 181–182, 213, 219, 228–229, 232–233, 236–237, 248–250, 255, 262, 266, 268–269, 273, 280, 281, 287, 291–292, 299, 303–304, 307, 314–316, 318, 320–321, 324, 333–334, 338, 343–344, 349–350, 353, 358–360, 367–368, 375–378, 388–389, 390, 395–396, 407, 412–413, 425–426, 435–437, 453–455, 465–466, 472, 478–479). The Board found that, absent discrimination, the 38 strikers named in its order would all have been taken back by petitioner by January 1, 1936 (R. 859, 860–861, 912; R. 750–756).

The Board found also that two other persons, Curtis and Daugherty, whose employment with petitioner had lawfully been terminated prior to the beginning of the strike, were thereafter refused employment by petitioner because of their membership and activity in the Union (R. 868–870, 906; R. 248–250, 280–281, 527).

Upon the foregoing evidentiary findings, the Board found that the 38 strikers ceased work as a

consequence of and in connection with a labor dispute which was "current" when the Act took effect on July 5, 1935, and that, by virtue of Section 2 (3) of the Act (*infra*, p. 16), they remained "employees" for purposes of the Act (R. 862–864). The Board concluded that petitioner's discriminatory refusal to reinstate the strikers, or consider them for reinstatement, to positions available between August 9 and the end of the strike on August 24, or to the positions which became available thereafter, constituted discrimination against "employees" within the proscription of Section 8 (1) and (3) of the Act (*ibid.*). The Board further found, in the alternative (R. 864–865), that if the strikers were no longer "employees" at the time of the discrimination against them, petitioner's denial of employment to them, as well as to Curtis and Daugherty who concededly were merely former employees, violated Section 8 (1) and (3).

The Board's order required petitioner to cease and desist from its unfair labor practices; to offer reinstatement with back pay to 39 of the 40 men; to make whole the fortieth individual (who did not desire reinstatement) for any loss of wages suffered by him up to the date when he became unemployable; to pay over to governmental relief agencies sums equal to any amounts disbursed by those agencies for the employment of the 40 men on work-relief projects; and to post notices (R. 915–913).

Thereafter, petitioner filed a petition in the court below to review and set aside the Board's order (R. i–viii). The Board answered, requesting enforcement of its order (R. xi–xvii). On July 11, 1940, the court handed down its opinion (R. 923–929) enforcing the Board's order except that it eliminated the provisions relating to Curtis and Daugherty [4] and the provision requiring petitioner to reimburse governmental relief agencies, modified the back-pay provisions by requiring the deduction of such amounts as each striker failed without excuse to earn, conditioned the reinstatement of 21 of the strikers upon the adducing of additional evidence before the Board that other employment which they had obtained was not substantially equivalent to their employment with petitioner, and modified the form of notices in a manner requested in the Board's brief.[5] Judge Learned Hand filed a concurring opinion (R. 929–930) stating that except for the earlier decision of the same circuit in *National Labor Relations Board* v. *National Casket Co.*, 107 F. (2d) 992, he would have held that all of the individuals involved, whether or not they were "employees," were discriminated against in viola-

[4] The court held that the Board was without power to order petitioner to offer employment to persons who were not "employees" (R. 928–929).

[5] The Board does not agree that the court below was correct in setting aside or modifying its order in any respect other than the requested change in the form of notices.

tion of the Act. On July 26, 1940, the court entered a decree in conformity with its opinion (R. 930–933).

ARGUMENT

1. Petitioner contends on various grounds (Pet. 10–15) that the Board and the court below erred in holding that the strikers were "employees" within the meaning of Section 2 (3) of the Act at the time petitioner refused to reinstate them because of their union membership and activities.

(a) Petitioner's assertion (Pet. 10) that its first acts of discrimination occurred subsequent to the termination of the strike on August 24, 1935 (after which date it contends the strikers were no longer "employees"), challenges the concurrent findings of the Board and the court below that between August 9 and August 24 petitioner discriminatorily refused to consider for reinstatement or to reinstate any of the strikers, because of their union membership and activities, although 21 positions became available for which they applied. Whether those findings are supported by substantial evidence presents no question of general importance. Compare *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U. S. 206, 208; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, No. 588, last Term, decided May 20, 1940. Further, the evidence summarized in the Statement (*supra*, pp. 3–5), affords full support for the challenged findings.

Along the same line, petitioner assumes (Pet. 12) that the basis for the discrimination found to have been exercised against the strikers between August 9 and August 24 consisted of its failure to reinstate all the strikers *en masse*: upon this assumption, and pointing out that there were more strikers than there were positions available prior to August 24, petitioner asserts that the decision below has the effect of requiring it to discharge men lawfully hired prior to August 9 to fill the strikers' places and hence conflicts with the decision of this Court in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. But the initial assumption is erroneous. The Board's findings of unfair labor practices prior to August 24 were based not upon petitioner's failure to discharge replacements to make room for strikers—indeed, the court below expressly distinguished that situation (R. 926–927)—but upon petitioner's discriminatory refusal to consider any of the strikers for the 21 positions which became available and were filled with other applicants after the strikers requested reinstatement (R. 860–864).

(b) Petitioner further contends (Pet. 10, 13) that since it filled the strikers' places and resumed normal operations shortly prior to the effective date of the Act, there could be no "current labor dispute" when the Act took effect, and hence that the strikers were not "employees" within the meaning of Section 2 (3) after the effective date of the Act. But, as the court below held (R. 926),

the factors relied on by petitioner do not negative the existence of a "current labor dispute"; the currency of the dispute is a question of fact on which the Board's findings are conclusive if supported by substantial evidence. *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, 147 (C. C. A. 9th), certiorari denied, 304 U. S. 575. In the present case, the concurrent findings of the Board (R. 862–863) and of the court below (R. 925–926) that the labor dispute was "current" when the Act took effect, are amply supported by the proof of the continued maintenance of the picket lines (*supra*, pp. 3–4) and the acknowledgments by petitioner itself after July 5, that it recognized the continued existence of the strike (R. 648, 650–655, 657–659, 669). Further, the question of fact as to the currency of the dispute having been resolved against petitioner both by the Board and by the court below, no question worthy of review by this Court is presented. *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 558.

National Labor Relations Board v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, cited by petitioner (Pet. 10), plainly is not in conflict with the decision below. In that case the Board found that the employer refused to bargain with the representative of his striking employees on July 23, 1935, and ordered reinstatement of the strikers as of that date, to the displacement of

new employees hired thereafter. In holding that there was no refusal to bargain on July 23, and that the reinstatement order was therefore invalid, the Court pointed out that, while there was a later refusal to negotiate in September, the employer was then "operating with a full complement" of new employees. Since those new employees had been validly hired prior to the September refusal to bargain, they could not be displaced by reinstatement of the strikers, predicated upon that refusal. Accordingly, the Court remarked, restoration of the strikers "could as a practical matter" be effected only upon the basis of some refusal to bargain "before respondent had resumed normal operation of its factory." This was by no means a holding that the strike was not "current" in September so as to relieve the employer of his obligation to bargain with "employees."*

(c) Finally, petitioner contends (Pet. 13–14) that the Act was retroactively, and hence improperly, applied in this case because the common-law status of the strikers as employees was terminated before July 5, 1935, the date the Act

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*That the Court was not deciding any such question is rendered perfectly clear by the fact that no such issue was presented in that case. The sole refusal found by the Board was the July 23rd one; the Board expressly passed the question whether the September refusal was an unfair labor practice. *Matter of Columbian Enameling & Stamping Co.*, 1 N. L. R. B. 181, 194–198, 199.

was approved. A similar argument was made and rejected in *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731, and *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; 99 F. (2d) 533, certiorari denied, 306 U. S. 646. Whether or not the strikers retained their status as employees under the common law is of no consequence as long as they satisfied the definition of "employees" under the Act, and as long as petitioner's unfair labor practices occurred, as they did, after the Act took effect. In such a case the Act is merely being applied to an existing situation. As this Court held in *Reynolds* v. *United States,* 292 U. S. 443, 449:

> A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment.

Accord: *Cox* v. *Hart,* 260 U. S. 427, 435; *New York Central Railroad* v. *United States,* 212 U. S. 500; *Samuels* v. *McCurdy,* 267 U. S. 188, 193; *Ruppert* v. *Caffey,* 251 U. S. 264, 301; *In re Rahrer,* 140 U. S. 545, 564.

Further, the situation here presented, of a strike prior to the effective date of the Act, is no longer of importance in the administration of the Act.

For that reason, also, the question is not worthy of review by this Court.

2. The court below enforced the award of back pay to one striker up to the time when he became unemployable, and also enforced the award of back pay to 21 other strikers up to the time when they may have obtained substantially equivalent employment, which fact, the court held, would bar their reinstatement.[1] Petitioner contends (Pet. 15) that the decision below upholding the award of back pay without reinstatement is in conflict with *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646.

These is no conflict with the *Carlisle* case. The statement of Judge Haney to which petitioner refers (99 F. (2d), at 537) was plainly *dictum*, since the court in that case held that the employees had not obtained other equivalent employment and enforced both the reinstatement and back-pay provisions of the Board's order. It was, moreover, the *dictum* of but a single judge. Judge Stephens, concurring, stated that the question was not before the court and that no opinion concerning it should be expressed (99 F. (2d), at 543), while Judge Wilbur concurred in the result only (99 F. (2d), at 544). The holdings on the point are contrary to petitioner's contention. *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61

[1] The court remanded the proceedings to the Board for further evidence concerning the equivalence of their other employment (*supra*, p. 7).

(C. C. A. 4th); *Republic Steel Corp.* v. *National Labor Relations Board,* 107 F. (2d) 472 (C. C. A. 3rd), certiorari granted limited to another point, No. 14, this Term; *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* decided July 11, 1940 (C. C. A. 7th).

3. The Board found that, absent discrimination, all of the strikers would have been restored to work by January 1, 1936, and awarded back pay from that date (R. 916–917, 912–913). Petitioner's contention (Pet. 15–16) that some deduction should have been allowed for the delay in filing charges and in the proceedings thereafter to final order, is confined to the facts of this case and presents no question of general importance justifying review.

Moreover, the action of the Board and of the court below is clearly correct. The statute itself contains no requirement that any deduction be made from back pay awarded, and no compelling equities demanded that the burden of the continuing economic loss caused by petitioner's unfair labor practices be shifted from petitioner to the victims of its discrimination. The Union's delay in filing charges occurred during a period when more than 80 injunction suits had brought the administration of the Act practically to a standstill and had induced the common belief that it was of no avail to resort to proceedings under the Act. In May 1937, promptly after the decisions of this Court had upheld the constitutionality of the Act (*National Labor Relations Board* v. *Jones &*

Laughlin Steel Corp., 301 U. S. 1, and companion cases), the Union filed its charges (R. 4–5). The Board's delay thereafter in arriving at the final order was caused by the tremendous influx of cases which followed upon the *Jones & Laughlin* decision; the litigation of the present case had to run the course dictated by the whole of the work of the Board. Throughout the entire period petitioner had the power to stop the accumulation of back pay by ceasing its discrimination and reinstating the men. The holding of the court below that, in these circumstances, the Board did not abuse its discretion in casting the burden of the resulting loss upon petitioner, rather than upon its innocent employees, is entirely correct.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of general importance. The petition should therefore be denied.

FRANCIS BIDDLE,
Solicitor General.
THOMAS E. HARRIS,
Attorney.

CHARLES FAHY,
General Counsel,
ROBERT B. WATTS,
Associate General Counsel,
LAURENCE A. KNAPP,
Assistant General Counsel,
MORRIS P. GLUSHIEN,
Attorney, National Labor Relations Board.

SEPTEMBER 1940.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Secs. 152, 157, 158, 160, 163) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 10. * * *.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and

cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

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